IN THE

Supreme Court of the United States

October Term, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISON OF HUMAN RIGHTS on the Complaints of DONNA J. STERLING, MARY J. SLEDGE, SHIRLEY J. FELKER, PAMELA N. DOLAN, MARJORIE ADAMS, BONNIE L. WEAD, JOSEPHINE KANDEFER and DOLORES KOSTELNY,

Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

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Question Presented

In view of (1) the inapplicability of the Employee Retirement Income Security Act of 1974 (ERISA) to causes of action which arose before January 1, 1975; (2) the exclusion from the supersedure clause in ERISA of em-

ployee benefit plans maintained solely to comply with State disability benefit laws; and (3) the provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to employees than what was afforded by Title VII before its amendment on October 31, 1978, does the Supremacy Clause invalidate a decision of the Appellate Division* requiring petitioner to provide to employees disabled in any way connected with pregnancy fringe benefits equivalent to those provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities?

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Article 15 (McKinney's 1972), hereinafter "the Human Rights Law," to an employer which in 1972, 1973 and 1974 disallowed to employees disabled in connection with pregnancy and childbirth fringe benefits provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities.

In 1974, 1975 and 1976, after hearings under the Human Rights Law, the State Division of Human Rights issued orders finding petitioner's practice discriminatory as to sex, and directing petitioner to cease and desist and to provide, for employees disabled in any way connected with pregnancy, fringe benefits equivalent to those pro-

* *Westinghouse Electric Corp.* v. *State Human Rights Appeal Board,* 60 App. Div. 2d 943, 401 N.Y.S.2d 597 (3rd Dept. 1978), *appeal dismissed,* 44 N.Y.2d 731, —— N.E.2d ——, *appeal denied,* 45 N.Y.2d 705, —— N.E.2d ——.

vided for employees disabled by nonoccupational injury or illness. The Division's orders were sustained on the rule in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board,* 41 N.Y.2d 84, 359 N.E.2d 393 (1976).

Petitioner perceives a conflict with the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§1001 *et seq.*, although each complainant's cause of action arose before the effective date of the Act, and although ERISA does not purport to supersede State legislation relating to plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. §1003(b)(3); see §1144(a). And although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, 42 U.S.C. §§2000e-7, 2000h-4, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and decisions thereunder. Petitioner claims these conflicts sufficient to raise a question under the Supremacy Clause, U.S. Const. Art. VI cl. 2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under ERISA.

Petitioner relies on the supersedure clause in ERISA, 29 U.S.C. §1144(a), and on its legislative history, to substantiate its argument that the courts of New York erred in sustaining the Division's orders. This Court has recognized ERISA as a comprehensive Federal regulation preempting State laws but as expressly disclaiming any effect with regard to events antedating January 1, 1975. *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L.Ed.2d 443, 447 n.1 (1978); see 29 U.S.C. §1144(b), providing that ERISA does not apply to causes of action which arose before that date.

The causes of action in this case arose in 1972, 1973 and 1974, when the complainants were disallowed, for periods of disability connected with pregnancy, benefits provided by petitioner uniformly, pursuant to the State Disability Benefits Law, N.Y. Workmen's Compensation Law Art. 9 (McKinney's 1965) ("DBL"), to employees disabled otherwise. ERISA does not apply.

But even if ERISA did apply, it would not preempt application of the Human Rights Law in this case. Excluded from the operation of the supersedure clause in ERISA, 29 U.S.C. §1144(a), are employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." §1003(a)(3). The supersedure clause of ERISA permits application of State fair

employment legislation to plans like petitioner's which fall within that exclusion. On August 3, 1977, the Disability Benefits Law was amended to impose upon employers in the State of New York, including petitioner, a requirement substantially similar to the requirements of the Division's orders. L. 1977 ch. 675 (hereinafter "the DBL Amendments"). The effect of the DBL Amendments is to legislate a mandatory minimum wage replacement benefit for employees disabled by pregnancy. The minimum benefit is half-pay up to $95 per week. DBL §204.2 as amended, L. 1974 ch. 583 §6. Benefits under a plan or agreement must be "at least as favorable" as the statutory benefits. DBL §211.5. A plan can be restricted to one or more classes of employees, but a class cannot be determined arbitrarily. 12 N.Y.C.R.R. §§355.6, 355.7. The DBL Amendments thus require the same evenhanded provision of benefits directed by the Division's orders. The Division respectfully submits that the question petitioner seeks to raise under ERISA with respect to those orders is so easily answered by the provisions of ERISA, the DBL and the DBL Amendments that nothing is left warranting review by this Court. Substantially, if not entirely, the question is moot.

Even if this Court should perceive some marginal viability in the question, ERISA would not necessarily preempt application of the Human Rights Law to petitioner's employee benefit plan. ERISA contains a nonimpairment clause indicating Congressional intent to permit application of State fair employment legislation to employee benefit plans:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sec-

tions 1031 and 1137(b) of this title) or any rule or regulation issued under any such law." 29 U.S.C. §1144(d).

Title VII is not mentioned in Sections 1031 and 1137(b), and therefore continues in full force and effect.

No distinction is made in ERISA between the substantive provisions of Title VII, 42 U.S.C. §§2000e-2, 2000e-3, and the numerous provisions recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(g)(1), 2000e-5(b)-(e), 2000e-7, 2000e-8(b); see §2000h-4. The nonimpairment clause of ERISA preserves Title VII in its entirety, including provisions permitting application of more stringent State statutes.

During debate on ERISA, an amendment was offered to add a clause prohibiting discrimination. The amendment was dropped after reference was made to the applicability of the prohibitions in Title VII. 119 Cong. Rec. 30409-10 (Sept. 19, 1973); 120 Cong. Rec. 4726 (Feb. 28, 1974).

Rejection by Congress of a nondiscrimination clause in ERISA and Congressional reliance, in the drafting and enactment of ERISA, upon Title VII and its provisions acknowledging and preserving State fair employment legislation appear to place a heavy burden upon those who would argue that States should play no part in eliminating discrimination in employee benefit plans. See Feerick, "Labor Relations—Birth of a Child," N.Y.L.J. June 3, 1977 p. 1 col. 1 at 26 col. 3. The Division respectfully submits that this is not a case in which that burden can be discharged. References to ERISA in debate on other legislation, see Petition at 12-14, do not change the provisions of ERISA which recognize and preserve Title VII and its relationship to State and local counterparts.

The recent amendment of Title VII to protect the pregnant worker, P.L. 95-555 (hereinafter "the Title VII Amendment") extinguishes the question petitioner has sought to raise. The amendment demonstrates intent on the part of Congress not only to prohibit discrimination against the pregnant worker in terms, conditions and provisions of employment, but also—in the face of ERISA—to continue deferring to State and local fair employment agencies, including the Division, for the initial enforcement of that prohibition through counterparts in State and local law. See Point II, *infra*. As to matters antedating the effective date of the Title VII Amendment, the petition retains little if any viability. A pronouncement as to petitioner's rights and responsibilities before that date under the Human Rights Law and ERISA would be largely academic, engaging this Court in a retrospective exercise made futile by supervening legislation.

II. Petitioner raises no substantial question under Title VII.

Petitioner cites *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), to justify its withholding from employees disabled in connection with pregnancy fringe benefits provided by petitioner to employees disabled otherwise. Those cases are not in point.

Aiello upholds under the Equal Protection Clause of the Fourteenth Amendment a California statute excluding disabilities connected with normal pregnancy from coverage of an employee-funded program of disability benefits. In a footnote which is frequently cited and quoted, this Court took care to point out that State legislatures are constitutionally free to include or exclude pregnancy from the coverage of such legislation on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496 n.20. Under *Aiello,* therefore, State fair employment legislation may constitutionally be applied to protect pregnant workers from disallowance of employee benefits paid to colleagues who are not pregnant.

Gilbert holds that an employer does not discriminate as to sex in violation of Title VII by excluding pregnancy-related disabilities from fringe benefits provided for other disabilities. Even if this Court were to equate the issue here with the issue in *Gilbert,* it could not hold that Title VII controls and restricts interpretation of the Human Rights Law. Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the State statute permits what Title VII prohibits there is conflict and Title VII will preempt and supersede. 42 U.S.C. §2000h-4. But when the State statute prohibits what Title VII permits there is no preemption. 42 U.S.C. §2000e-7. States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts," Frankfurter, J., concurring, in *Railway Mail Ass'n* v. *Corsi,* 326 U.S. 88, 98 (1945).

Like the question under ERISA, the question petitioner seeks to raise under Title VII is extinguished by the Title VII Amendment, which now affords the pregnant worker much of the protection available under the Human Rights Law.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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December 6, 1978

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